Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Commercial Spectrum	)	
Enhancement Act and Modernization of the	)	WT Docket No. 05-211
Commission's Competitive Bidding Rules and	)	
Procedures	)	

To the Commission

COMMENTS OF THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

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Introduction and Summary

The Minority Media and Telecommunications Council ("MMTC") respectfully submits these Comments in response to the Further Notice of Proposed Rulemaking (*"FNPRM"*) in the above-captioned proceeding. 1/

MMTC believes that a strong and effective Designated Entity ("DE") program is essential for the Commission to comply with Congress's mandate to design and conduct spectrum auctions in a manner that "promote[s] economic opportunity and competition, . . . avoid[s] excessive concentration of licenses by disseminating licenses among a wide variety of applicants, including small businesses, . . . and businesses owned by members of minority groups and women," 2/ and "ensure[s] that small businesses . . . and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services . . . ." 3/

1/ *In the Matter of Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, Further Notice of Proposed Rulemaking, WT Docket No. 05-211* (released February 3, 2006) (*"FNPRM"*). These Comments reflect the institutional views of MMTC, and are not intended to reflect the views of each individual director, officer or member of MMTC.

2/ 47 U.S.C. §309(j)(3)(B).

3/ 47 U.S.C. §309(j)(4)(D).

Congress's statutory goals will not be achieved, however, as long as the DE program is susceptible to manipulation by the America's largest national wireless carriers. MMTC therefore supports the *FNPRM's* tentative conclusion that auction bidding credits and other DE benefits should not be awarded to entities that have a "material relationship" with a large in-region incumbent wireless service provider, and that this prohibition should apply to otherwise qualified designated entities, pursuant to Part I of the Commission's rules. 4/

In addition, although MMTC finds merit in the $5 billion revenue threshold suggested by Council Tree Communications, Inc. ("Council Tree") to determine which non-DEs would be defined as "large incumbent wireless services providers," and therefore covered by the proposed new DE restrictions, MMTC also suggests that the Commission consider applying a definition based on a wireless carrier's level of CMRS subscribership. The Commission could, for example, define the term "large in-region incumbent wireless service provider" to include wireless providers with 10 million or more CMRS subscribers, as of the date of the applicable DE short form filing. CMRS subscribership figures can provide a reasonably simple and effective way of distinguishing those incumbent wireless providers that have an overwhelming capacity and incentive to use the DE program to horde spectrum and forestall competition.

MMTC also suggests that the Commission apply the old CMRS spectrum aggregation limit attribution rules, and the equity plus debt broadcast attribution rule, in defining when a DE has entered into a "material relationship" with a "large in-region incumbent wireless service provider."

MMTC does not, however, support extending the proposed new restriction on DE benefits to applicants that have "material relationships" with communications or non-communications companies other than the largest incumbent national wireless companies. 5/ Companies which are not among the nation's largest national wireless incumbents are, by definition, less capable of using the DE structure to horde spectrum and forestall competition. Moreover, companies that currently are not among the ranks of the nation's largest national

4/ *FNPRM* at ¶1.
5/ *See id.* at ¶11.

wireless operators could potentially serve as sources of much-needed capital for DEs whose telecommunications, wireless and local, regional or niche marketing expertise provide the basis for negotiating legitimate, arms-length arrangements for passive financing. In short, such companies may foster greater wireless industry competition. Finally, the proximity in time of the AWS auction, scheduled for June 29, 2006, makes it necessary for the Commission to determine quickly where to draw the line in terms of partnerships between DEs and non-DEs. In this case, the record demonstrates that the largest incumbent national wireless operators have been able to successfully take advantage of the DE program in a manner that disserves the public interest, while no similarly compelling demonstration has been made regarding the capabilities of other large companies.

MMTC believes that additional rule modifications – beyond a restriction on in-region partnerships between DEs and the largest incumbent wireless operators – are needed in order to restore the legitimacy of the DE program. MMTC therefore urges the Commission to consider, and seek comment on, proposals to: (1) create a pre-clearance process for applicants interested in participating as DEs in spectrum auctions; (2) conduct random audits of DEs after they have been awarded licenses; and (3) apply strengthened unjust enrichment rules when a DE attempts to assign or transfer a license to a recipient that does not qualify for DE status.

For 20 years, MMTC has promoted participation by minorities and small businesses in the ownership ranks of the communications industry, including in the wireless industry. This experience has led MMTC to conclude that, although well-intentioned, the Commission's current DE rules have failed to achieve the goals for which they were developed. To a considerable extent, instead of creating opportunities for legitimate small and minority businesses, the DE rules have enabled the nation's largest incumbent national wireless operators to wield influence over an increasingly large amount of valuable spectrum resources, forestall competition and avoid disbursing millions of dollars in spectrum license payments to the U.S. Treasury. As an organization whose members and constituents seek to maintain the legitimacy of all programs aimed at diversifying ownership within the communications industries, MMTC

urges the Commission to revise its DE rules consistent with its tentative conclusion in the *FNPRM*. Such a revision would reduce the likelihood that the DE program will continue to be manipulated, and increase the chance that the DE program will once again become an effective vehicle for the advancement of Congress's economic opportunity, diversity and competition goals.

I. WHEN GRANTING THE COMMISSION SPECTRUM AUCTION AUTHORITY, CONGRESS SOUGHT TO ENSURE THAT THE REQUIREMENT TO PURCHASE SPECTRUM LICENSES AT AUCTION WOULD NOT IMPEDE THE GOALS OF PROMOTING ECONOMIC OPPORTUNITY, DIVERSITY AND COMPETITION IN THE WIRELESS MARKET

When Congress granted the Commission auction authority, it was aware that consumers and the general economy stood to benefit considerably from the innovation, productivity gains and lower prices that would flow from a more competitive and diverse wireless market. Thus, it recognized that the Commission needed to take concrete steps to ensure that the requirement to purchase spectrum licenses at auction would not impede economic opportunity, diversity and competition. A 1993 House Budget Committee Report on the legislation that initially provided the Commission with its auction authority stated:

> The Committee is concerned that, unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries. 6/

According to the Report:

> One of the primary criticisms of utilizing competitive bidding to issue licenses is that the process could inadvertently have the effect of favoring only those with "deep pockets," and would therefore have the wherewithal to participate in the bidding process. This would have the effect of favoring incumbents, with established revenue streams, over new companies or start-ups. 7/

On that basis, as part of the grant of auction authority under Section 309(j) of the Communications Act, Congress directed the Commission to develop its auctions program in a

6/ H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 254 (1993).
7/ *Id.* at 255.

manner that promotes the dissemination of "licenses among a wide variety of applicants, including small businesses . . . and businesses owned by members of minority groups and women," 8/ and "ensure[s] that small businesses . . . and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services . . ." 9/

In implementing these statutory mandates, the Commission created the DE program and took several steps to promote Congress's economic opportunity, diversity and competition goals. At various times, the Commission has set aside spectrum licenses for bidding only by DEs, 10/ offered bidding credits to DEs that were required to bid against well-financed larger entities 11/ and established rules to encourage strategic and institutional investment in DEs. 12/

II. CONGRESS'S ECONOMIC OPPORTUNITY, DIVERSITY AND COMPETITION GOALS HAVE BEEN THWARTED BY THE NATION'S LARGEST INCUMBENT WIRELESS OPERATORS

Some of the Commission's efforts at promoting Congress's policy goals have been successful. Using spectrum licenses that were acquired under closed DE bidding, several DEs have built out competitive wireless networks in areas where they did not exist before and introduced creative and valuable service offerings, including services targeted at low-income and minority consumers. 13/ On the whole, however, the DE program could certainly be more effective. A significant way to improve the DE program is to eliminate the ability of the largest

8/ 47 U.S.C. §309(j)(3)(B).
9/ 47 U.S.C. §309(j)(4)(D).
10/ *E.g.*., Auctions 5, 22, 35 and 58.
11/ *See* 47 C.F.R. §1.2110(f).
12/ *See, e.g.,* 47 C.F.R. §1.2110(c)(5).
13/ *See* Paul Davidson, *Spectrum License Distribution Scrutinized*, USA Today, February 13, 2006 at 4B (noting unlimited local calling plans offered by Metro PCS); *see also* Comments of MobiPcs in WT Docket No. 05-211 (February 16, 2006); *see also* Ex Parte of Council Tree Communications, Inc. in WT Docket No. 02-353 (January 11, 2006) at 11 (noting that many non-national carriers such as Leap, MetroPCS and others have embraced service offerings targeted at lower income consumers).

incumbent national wireless companies to extend their influence and market power by manipulating the program.

In the last two significant wireless auctions, Auctions 35 and 58, the largest incumbent national wireless companies used their partnerships with DEs to access and horde spectrum that otherwise would not be available to them under the Commission's rules. Documents filed with the Commission indicate that all but one of the largest incumbent wireless carriers were involved in the formation of new companies that participated in the auctions as DEs. While the largest incumbent national carriers structured agreements that are presumably within the Commission's guidelines, such agreements primarily serve to extend their influence and market position rather than promote the aims of the DE program. After participating in the formation of the new DEs, most of the largest incumbent national wireless carriers made investments that enabled them to hold an overwhelming amount of the equity and debt issued by the new DEs. 14/ In many cases, the amount of equity held by the largest national wireless incumbents in Auction 35 and 58 DEs is 80 percent or greater. 15/ In addition, some of the largest national incumbent wireless carriers have received from their DE partners exclusive access to valuable spectrum and network capacity that otherwise could have been used to offer new services and induce the national wireless incumbents to better respond to the needs of the marketplace. 16/ In Auction 58 alone, these types of arrangements allowed DE partners of the largest incumbent national wireless providers to garner over $1 billion worth of DE licenses. 17/

14/ *See* Form 601 of Vista PCS, LLC ("Vista") (February 15, 2006), Exhibit A at 1, Exhibit B at 6-7 (indicating that Verizon Wireless held 80 percent of Vista's equity and indicating that Verizon Wireless would be supplying 80 percent of Vista's capital needs until total capital contributions exceeded $50 million, and then would be prepared to provide additional financing if third-party financing under certain circumstances).

15/ *See* Form 601 of Edge Mobile, LLC ("Edge") (March 18, 2005), Amended Exhibit A at 1 (noting that Cingular holds an 85 percent equity interest in Edge); *see also* Form 601 of Cook Inlet/VS GSM VII PCS, LLC ("Cook") (April 20, 2005), Exhibit B at 1 (noting that T-Mobile's equity interest in Cook could expand to as much as 85 percent); *see also* Form 601 of Vista (February 15, 2006), Exhibit A at 1 (noting that Verizon Wireless then held an 80 percent equity interest in Vista).

16/ The Form 601 of Wirefree Partners III, LLC ("Wirefree") indicates that prior to the start of Auction 58, Wirefree entered into a leasing agreement with Sprint PCS that provided for

These efforts have further exacerbated the competitive harms caused by wireless industry consolidation, 18/ making it extremely difficult for legitimate DEs to compete in terms of spectrum resources, network capacity and coverage. 19/ As the market for wireless services has consolidated among a small group of very large companies, the innovation and focus on niche services that had once been a hallmark of the wireless industry has largely disappeared. As the legislative history of Section 309(j) makes clear, Congress never intended for the primary beneficiaries of its DE policies to be large incumbent national wireless carriers masquerading as small businesses. It is therefore essential for the Commission to adopt its tentative conclusion and prevent incumbent national wireless companies that have demonstrated a willingness to further consolidate their industry control through the Commission's DE program from doing so in the future.

III. DETERRING DESIGNATED ENTITY PROGRAM MANIPULATION WOULD ELIMINATE A MARKET ENTRY BARRIER FOR LEGITIMATE SMALL AND MINORITY OWNED BUSINESSES IN THE AWS AUCTION

Deterring DE program manipulation would make bidding credits more meaningful for legitimate small and minority businesses in the AWS auction. The AWS auction

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Wirefree to lease to Sprint 50 percent of the spectrum Wirefree acquired in Auction 58. *See* Form 601 of Wirefree (September 6, 2005), Exhibit E at 1-4. The Form 601 of Cook indicates that at the time of Cook's Form 601 filing, Cook and T-Mobile were negotiating an agreement requiring Cook to sell an unspecified amount of minutes on its PCS network to T-Mobile. *See* Form 601 of Cook (April 20, 2005), Exhibit E at 4-5.

17/ *Ex Parte* of Council Tree Communications, Inc. in WT Docket No. 02-353 (June 13, 2005) at 6.

18/ *See id.* (noting that "[f]ollowing consummation of announced mergers, the top-5 wireless carriers today will control 89 percent of United States wireless service subscribers, up from just 50 percent in 1995.")

19/ *See, e.g.*, Reply Comments of Leap Wireless International, Inc. in WT Docket No. 05-265 (January 26, 2006) at 2 ("The small, regional and rural carriers have amply demonstrated that, under current market conditions, anti-competitive roaming and pricing practices are not only likely as a predictive matter – they are common"); *see also* Comments of the National Telecommunications Cooperative Association in WT Docket No. 06-17 (February 17, 2006) at 4-5 (noting that the largest carriers use market power to force smaller carriers into unfavorable roaming agreements, "cherry pick" highly profitable rural areas while neglecting other areas, and often leave large rural sections of a large service territory unused); Comments of Cellular South, Inc. in WT Docket No. 06-17 (February 17, 2006) at 2 (indicating that smaller carriers experience substantial delays receiving next-generation data equipment from various manufacturers and difficulties negotiating roaming agreements with larger competitors).

represents the best opportunity in the foreseeable future for small and minority businesses to acquire the ability to provide broadband services. Yet unless the DE rules are modified as proposed in the *FNPRM*, the largest incumbent national wireless carriers will have the ability to structure well-capitalized DEs with the same access to AWS auction bidding credits as the legitimate, small and minority companies. As the Commission has stated:

> We agree [with Congress] that small entities stand little chance of acquiring licenses in . . . broadband auctions if required to bid against existing large companies . . . If one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business. 20/

The Commission has also indicated that "[the] inability of small businesses and businesses owned by women and minorities to obtain adequate private financing creates a serious imbalance between these companies and large businesses in their prospects for competing successfully in broadband . . . auctions." 21/ Thus, by adopting its tentative conclusion in the *FNPRM*, the Commission would eliminate a significant market entry barrier to the participation of legitimate small and minority businesses. In particular, when these companies must bid against illegitimate companies that also hold bidding credits, the value of the legitimate companies' bidding credits is neutralized. Once auction manipulation is deterred, arms-length lenders and passive investors will be more likely to support legitimate small entrepreneurs, thereby lifting their most significant barrier to entry – access to capital. 22/

20/ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report & Order*, 9 FCC Rcd 5532, 5585 ¶121 (1994) ("*Fifth Report & Order*").

21/ *Id*. at 5584 ¶118.

22/ *See, e.g*., William Bradford, "Study of Access to Capital Markets and Logistic Regressions for License Awards by Auctions," University of Washington (2000), *discussed in* Public Notice, *Media Bureau Seeks Ways to Further Section 257 Mandate and to Build on Earlier Studies*, 19 FCC Rcd 10491 (2004) (concluding, *inter alia*, that minority status resulted in a lower probability of winning in spectrum auctions). In 2006, the Commission will be expected to report to Congress on its efforts since 2003 to eliminate market entry barriers. *See* 47 U.S.C. §257(c). Efforts to discourage DE program manipulation would be a worthy component of the Commission's Section 257 initiatives.

IV. THE COMMISSION SHOULD CONSIDER DEFINING "LARGE INCUMBENT WIRELESS SERVICE PROVIDER" BASED ON SUBSCRIBERSHIP INFORMATION AND DEFINING "MATERIAL RELATIONSHIPS" BETWEEN DESIGNATED ENTITIES AND LARGE IN-REGION INCUMBENT WIRELESS CARRIERS BASED ON THE OLD CMRS SPECTRUM CAP ATTRIBUTION RULES

The Commission has at its disposal a useful set of standards for identifying those incumbent wireless providers that should be restricted in their dealings with DEs. First, although the revenue threshold suggested by Council Tree should be carefully considered, CMRS subscribership figures could also provide an easy and reliable way of identifying those incumbent wireless carriers that are most capable and likely to manipulate the DE regulations. The record demonstrates that wireless carriers with subscribership levels of 10 million or more have either entered into business arrangements with DEs in the past or, by virtue of their size and control over roaming, network access or other arrangements, have the ability to further extend their nationwide presence and market positions through such DE relationships. 23/ In view of the strong market position of such companies, and their history of using the DE program to their advantage, it would be reasonable for the Commission to limit the manner in which incumbent wireless companies with 10 million or more subscribers partner with DEs.

Similarly, the Commission should define "in-region" and "material relationships" to include those large incumbent wireless carrier DE relationships that are captured by the Commission's old CMRS spectrum attribution rules 24/ or by the current "equity-debt-plus" ("EDP") broadcast attribution rule. 25/ When the CMRS spectrum aggregation attribution rules were in effect, the Commission relied on them to identify interests and geographic overlaps that threatened to curb competition. Given the current level of wireless consolidation (where the percentage of the CMRS market controlled by the five largest wireless carriers is far greater today than it was when the CMRS spectrum aggregation rules were in effect), it makes sense for the Commission to use the CMRS spectrum aggregation limit attribution rules as benchmarks in

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23/ *See* n. 21 *supra*.
24/ *See* 47 C.F.R. §20.6.
25/ *See* 47 C.F.R. §73.5008(c).

this limited context. The Commission's EDP attribution rule could also be used to capture "material" interests in DEs. In view of the tremendous consolidation that currently exists in the wireless industry, and the demonstrated ability of the largest incumbent wireless providers to use the DE program to extend their reach, the Commission would be justified in applying the old CMRS spectrum attribution thresholds and EDP broadcast attribution rule in administering its proposed new DE restrictions.

V. THE COMMISSION SHOULD NOT APPLY ITS NEW DESIGNATED RESTRICTIONS TO RELATIONSHIPS BETWEEN DESIGNATED ENTITIES AND OTHER LARGE COMPANIES

MMTC does not believe that the Commission should extend its proposed restriction on "material relationships" to companies other than the largest incumbent national wireless service providers. Although the Commission should continue to review the DE program's integrity and enact the additional reforms discussed below, it would be premature at this point to extend the proposed new restrictions to DE arrangements involving companies that are not among the largest incumbent national wireless service providers. In contrast to the largest wireless national incumbents, other large communications or non-communications companies could bring added competition to the wireless industry.

Because other large companies do not enjoy nationwide CMRS footprints, high subscribership levels, equipment economies of scale and the marketing and business advantages that come with significant market share, they should have a greater need for the wireless and niche marketing skills of potential DEs, and should thus have stronger incentives – beyond the desire to horde spectrum and forestall competition – to enter into legitimate, arms-length DE arrangements. This underscores why the Commission's tentative line drawing in the *FNPRM* is reasonable: when a large, incumbent national wireless company partners with a small entrepreneur, the small entrepreneur seldom if ever could bring an attribute or skill set to the table that the large company does not already possess. On the other hand, when a small entrepreneur partners with a non-incumbent, a small carrier, or a company not in the wireless

business, the small entrepreneur typically does bring to the table attributes and skill sets not possessed by its partner – for example, business development and financial management expertise, in-region or niche marketing expertise, or experience in wireless operations and technology. These arrangements deserve the presumption of validity. While no type of relationship is ever entirely immune from the potential of manipulation, the Commission is entitled to wide discretion in choosing the methods by which it can deter or remedy such manipulation. 26/ Three examples of these methods – which can be implemented irrespective of the identities of the partners in a DE applicant – are outlined below.

VI. THE COMMISSION SHOULD ADOPT ADDITIONAL REFORMS TO THE DESIGNATED ENTITY PROGRAM

The Commission has at its disposal several prophylactic measures that could help improve the DE program. It is already authorized, for example, to (1) allot additional staff and resources to critically examine data submitted in short form applications; (2) randomly conduct post-auction audits; and (3) apply its unjust enrichment rules when a DE attempts to assign or transfer its licenses to a recipient not qualified for DE status. These procedures should not be cumbersome, nor should they delay the AWS auction.

1. The Commission Should Conduct A Comprehensive Review Of The Qualifications of An Entity Seeking Designated Entity Status

The Commission should overhaul its approach to pre-auction certification so that ineligible applicants are disqualified *before* they are permitted to receive DE benefits and participate in the auction. Even when pre-selection discovery is available, self-certification has never been a reliable means of preventing the circumvention of the Commission's rules and policies. 27/ Challenging the validity of a bidder after it wins licenses is nearly impossible

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26/ An agency enjoys very wide discretion in its choice of remedies. *See, e.g.*, *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 418 (D.C. Cir. 1983) (holding that the Commission "has the discretion to determine what procedures best assure protection of the public interest.")

27/ *See, e.g.,* Public Notice, *Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, 2 FCC Rcd 2122 (1987) (re-establishing random audits of pre-designation construction permit applicants' financial certifications after five years of experience with self-certifications in lieu of documentation demonstrated that "a number of broadcast construction permit applicants have certified their financial qualifications without any

because the petition to deny process is time-consuming and expensive. Without discovery, it is almost impossible for a third party to provide the Commission with sufficient information to justify designation for hearing. Moreover, even if a petitioner to deny succeeds in disqualifying an auction winner, the petitioner would not be entitled to receive the residual licenses. Those licenses would have to be re-auctioned. Consequently, a losing bidder has little incentive to file a post-auction petition to deny even if such a petition had a chance of success.

Where signals indicate that further examination is necessary, the Commission should gather additional information to make sure that only *bona fide* small businesses receive the DE benefits. These investigations will require Commission staff reviewing those seeking DE status to discover (1) how the facilities and equipment are used and by whom; (2) who controls the day-to-day operations; (3) who controls policy decisions; (4) who has personnel responsibilities; (5) which entity or individuals control financial obligations; and (6) who controls receipt of monies and how profits are distributed. 28/ For example, the Commission could flag applications where initial disclosures and further inquiry investigation reveals that:

- The entity seeking DE status is wholly financed by a larger carrier that has revenues exceeding the threshold minimum for qualifying as a small business, very small business or entrepreneur;

- Shareholders or officers of an entity seeking DE status also own significant shares of voting stock in, or receive substantial benefits from, a larger company that would not qualify for DE status;

- The applicant appears to be hiding revenue and assets for the purpose of meeting the small business benchmarks in the DE rules;

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basis or justification. Such false certifications constitute abuses of the Commission's processes. They waste the resources of both the Commission and legitimate qualified applicants. As a consequence, the public may receive delayed service, substandard service, or no service at all. Further, such false certifications constitute material misrepresentations to the Commission by the applicants.")

28/ *FNPRM* at n. 34 (*citing Ellis Thompson Corporation*, 9 FCC Rcd 7138, 7138-7139 ¶9 (1994) in which the Commission identified these factors for determining *de facto* control of a business). These factors evidently figure in the well-known Gabelli DE fraud *qui tam* litigation in the Southern District of New York. *See* John R. Wilke, *In FCC Auctions, Gabelli was Behind the Scenes,* The Wall Street Journal, December 27, 2005).

- An entity seeking DE status has issued, to a larger carrier, warrants to purchase stock in lieu of actual stock, and the warrants, when exercised, would provide substantial ownership in the DE; or

- The resumes and work histories of owners, directors, and managers indicate a lack of experience administering business assets, or that these individuals' participation in the auction may not have be made on their own initiative but rather through the initiative of a funding source.

2. The Commission Should Conduct Regular Random Audits Of Designated Entity Applicants' Qualifications

In mass media EEO enforcement, the Commission has found that a random audit program is useful in deterring rule violations. 29/ The Commission should consider creating a similar audit program that would uncover manipulation of the DE program irrespective of the type of businesses in which a DE applicant's partner is engaged.

The Commission already has a rule that provides for DE audits. 30/ When the Commission promulgated the DE rules for broadband PCS, it stated:

> [W]e intend by these attribution rules to ensure that bidders and recipients of these licenses in the entrepreneurs' block are bona fide in their eligibility, and we intend to conduct random audits both before the auctions and during the 10-year initial license period to ensure that our rules are complied with in letter and spirit. If we find that large firms or individuals exceeding our . . . caps are able to assume control of licenses in the entrepreneurs' block or otherwise circumvent our rules, we will not hesitate to force divestiture of such improper interests or, in appropriate cases, issue forfeitures or revoke licenses. In this regard, we reiterate that it is our intent, and the intent of Congress, that women, minorities and small businesses be given the opportunity to participate in broadband PCS services, not merely as front for other entities, but as active entrepreneurs. 31/

29/ *See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Report and Order and Third Notice of Proposed Rulemaking*, 17 FCC Rcd 24018, 24066-67 ¶155 (2002) (reconsideration petitions pending) (adopting a program of random audits of the EEO compliance of 5% of radio and television licensees each year).
30/ *See* 47 C.F.R. §1.2110(m).
31/ *Fifth Report & Order*, 9 FCC Rcd at 5605-06 ¶168.

If the Commission were to regularly conduct random audits, it would signal to Congress and the telecommunications industry its commitment to upholding the goal of its DE rules and making sure that only *bona fide* small businesses benefit from the DE program. Audit procedures that incorporate site visits to offices and physical plants, interviews with staff and meaningful inquiries into the management of the licenses are more likely to yield discoveries of improper activity than cursory paper-bases audits which would allow the audited entity to craft creative responses to audit requests. 32/

3. The Commission Should Expand The Scope Of Its Unjust Enrichment Rules

The Commission asks whether it should expand the scope of its unjust enrichment rules that apply when a DE seeks to transfer or assign its licenses to an entity that would not qualify as a DE. 33/ Council Tree asks the Commission to also impose reimbursement obligations when, in the first five years of its license term, a company that acquired licenses using DE status enters into a new "material financial" or "material operational" relationship that would result in that entity losing its DE eligibility. 34/

This proposal has merit. History has shown that the first five years of the life of a license is when those that have exploited the DE program are most likely to shift control from the initial "qualified" individual or entity to an entity that may not be qualified to benefit from discounted licenses.

Under the Commission's current unjust enrichment rules, the Commission reduces the percentage value of the bidding credit (the difference between the bidding credit originally obtained and the bidding credit for which the restructured licensee would qualify) depending on

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32/ *See The Advancement of Black Americans in Mass Communications, 76 FCC2d 385, 392 n. 11 (1980*) (stating that the Commission had expanded and reorganized its EEO staff, which would "permit on-site reviews in appropriate cases.") On occasion, such on-site inspections have proven to be a useful regulatory tool. *See, e.g,, Adelphia Communications Corporation's Unit 305, Palm Beach County, Florida, MO&O & NAL*, 9 FCC Rcd 908, 909 ¶5 (1994 (imposing $121,000 forfeiture for EEO violations uncovered during site visit).

35/ The Commission's existing rules require disgorgement of an unjust enrichment equal "to the difference between the bidding credit obtained by the assigning party and the acquiring party would qualify, plus interest based on the rate for ten years . . . as a condition of Commission approval of the assignment or transfer." 47 C.F.R. §1.2111(d).

34/ *FNPRM* at ¶20 (*citing* Council Tree's Petition for Rulemaking).

the year of the license term that the transfer or assignment is requested. After five years, the Commission will approve the transfers or assignments after payment of merely 25 percent of the value of the bidding credit. 35/ To many of those who have used the DE program to expand their spectrum and market position, this penalty may be viewed as a cost of doing business and not as a meaningful deterrent. Therefore, the Commission should consider initiating an inquiry to adjust its reimbursement obligations to require repayment of 100 percent of the value of the bidding credit. In addition, the Commission should consider expanding the unjust enrichment standard to encompass the entire license term and not just the first five years, as Council Tree recommends. Adopting these measures may provide a disincentive for those seeking to advance their dominant market and spectrum positions through the DE program, and would advance Congress's goal of creating economic opportunity, diversity and competition among wireless spectrum recipients. 36/

Conclusion

With these modest reforms to promote transparency and deter manipulation of the rules, the Commission's DE program could become an effective vehicle for promoting economic opportunity, diversity and competition in the wireless market. MMTC urges the Commission to adopt its tentative conclusion in this proceeding, and also adopt broader initiatives aimed at ensuring the integrity and effectiveness of the DE program.

35/ 47 C.F.R. ¶1.2111(d).

36/ Notwithstanding these concerns, MMTC does not believe that the Commission should regard, as suspect, circumstances where the DE has experienced natural growth and has received new investment to accommodate that growth.

Respectfully submitted,

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February 24, 2006

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 24th day of February 2006 caused a copy of the foregoing "Comments" to be delivered by electronic mail to the following:

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